(1)

01 No. 395 AUG 30 2001

In The

# Supreme Court of the United States

STEVE DOELL,

*Petitioner,*

v.

HARDY MYERS, ATTORNEY GENERAL,
STATE OF OREGON,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The Supreme Court Of The State Of Oregon**

## PETITION FOR WRIT OF CERTIORARI

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26pp

## QUESTIONS PRESENTED

1. On an initiative petition ballot title regarding repeal of the death penalty, that will be circulated to the Oregon electorate, will be in the Voters Pamphlet, and will be on the ballot itself, does inserting the phrase "mandates restitution" violate the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment, when in fact the initiative measure does not mandate restitution?

2. Do the First and Fourteenth Amendments to the U.S. Constitution prohibit ballot titles that are inaccurate or misleading?

## LIST OF PARTIES

Petitioner (Petitioner In the Supreme Court of the State of Oregon):

Steve Doell

Respondent (Respondent In the Supreme Court of the State of Oregon):

Hardy Myers, Attorney General for the State of Oregon

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## PETITION FOR WRIT OF CERTIORARI

The undersigned counsel, on behalf of Petitioner Steve Doell, respectfully prays that a writ of *certiorari* issue to review the Judgment of the Supreme Court of the State of Oregon in the above-entitled proceeding (filed on June 1, 2001).

## OPINIONS BELOW

*Steve Doell v. Hardy Myers*, 332 Or. 169, ___ P.3d ___ (2001) (2001 WL586728) (opinion approving ballot title). (Appendix A).

## JURISDICTION

The Oregon Supreme Court decided this case on June 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

**First Amendment to the Constitution of the United States:**

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

**Fourteenth Amendment to the Constitution of the United States, Section 1:**

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## CONCISE STATEMENT OF THE CASE

This is a challenge to a ballot title certified by the Oregon Attorney General, and approved by the Oregon Supreme Court after challenge by the Petitioner herein, on an initiative measure seeking to abolish the death penalty in Oregon. The ballot title certified by the Attorney General reads as follows:

> AMENDS CONSTITUTION: MANDATES RESTITUTION AND LIFE IMPRISONMENT WITHOUT RELEASE/PAROLE AS AGGRAVATED MURDER SENTENCE; ELIMINATES DEATH PENALTY
>
> RESULT OF "YES" VOTE: "Yes" vote mandates restitution and life imprisonment without release/parole for aggravated murder; eliminates death penalty, life with possibility of release/parole as sentencing options.

RESULT OF "NO" VOTE: "No" vote retains death penalty, life imprisonment with possibility of release/parole, and life imprisonment without possibility of release/parole, as aggravated murder sentencing options.

SUMMARY: Amends Constitution. Under current law, juries determine whether persons convicted of aggravated murder are punished by death, life imprisonment without the possibility of release or parole, or life imprisonment with the possibility of parole after thirty years. The proposed measure requires sentencing such persons to restitution and life imprisonment without possibility of release or parole. Additionally, sentences of persons previously sentenced to death, but not yet executed, must be changed to restitution and life without possible release or parole. Restitution means that any income received in prison by persons convicted of aggravated murder must be distributed only for certain purposes, including restitution to victims of the person's crime or a crime victims' fund, and reimbursement for the prisoner's housing, health, rehabilitation, and living costs. Other provisions.

Mr. Doell, the petitioner herein, is a citizen and registered voter in Oregon. He challenged the ballot title before the Oregon Supreme Court, which has original jurisdiction of ballot title challenges. ORS 250.085(2).

In his **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY HARDY MYERS, ATTORNEY GENERAL**, Petitioner Doell raised the constitutional issues addressed herein. In relevant part, Petitioner argued to the Oregon Supreme Court as follows:

"[Petitioner] contends that all three parts of the Attorney General's Ballot Title raise serious constitutional questions. While states are normally given great deference to establish and regulate the election process, a state cannot allow a process that violates the United States Constitution. Generally the protections at issue come from the First Amendment, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

While petitioner has not found a case on point, the federal courts in other voting matters have expressed the interest to be protected. "The foundation of our 'democratic process' is the right of all qualified voters to cast their votes *effectively*." *Ayers-Schaffner v. Disteano*, 37 F.3d 726 (1st Cir. 1994) (emphasis added). "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " *Burdick v. Takushi*, 504 US 428, 433, 112 S.Ct. 2059, 119 L.Ed. 2d 245 (1992). Elections must be "fair and honest." *Burdick*, 504 U.S. at 433.

In the initiative process the importance of being accurate and fair in the ballot title is revealed at two critical points. First, during the gathering of signatures, people signing the petition ask to read the ballot title. Presumptively, they rely upon the ballot title to summarize accurately the measure before they sign the petition. Second, the ballot title is important at the time the voter casts his or her vote. In a perfect world, everyone who voted would be fully informed on every issue. Unfortunately, that does not happen. Oftentimes, voters may first be aware of a measure when they vote. For these

reasons an accurate and fair ballot title is critical." **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY HARDY MYERS, ATTORNEY GENERAL**, pps. 9-10.

The Oregon Supreme Court's opinion does not address the constitutional issues. The Court's short opinion obliquely notes that it has " . . . considered each properly preserved argument advanced by Petitioner in support of these challenges, . . . ". *Doell v. Myers*, 332 Or. at 171. In a footnote, the Court makes references to ORS 250.085(6), which provides that the court " . . . shall not consider arguments concerning the ballot title not presented in writing to the Secretary of State . . . ." (*See* Appendix B for Mr. Doell's letter to the Oregon Secretary of State, commenting on the draft ballot title). If the Oregon Supreme Court declined to address the constitutional issues raised herein because of ORS 250.085(6), that statutory provision would as well violate the First and Fourteenth Amendments of the U.S. Constitution, relied on herein.

## BACKGROUND

In his brief before the Oregon Supreme Court, Mr. Doell argued that the ballot title should state that this measure abolishes the death penalty and establishes a true life sentence for people convicted of Aggravated Murder, ORS 163.095, which is currently a capital offense pursuant to ORS 163.105. Mr. Doell objected to use of the

phrase "Mandates Restitution" at the beginning of the ballot title caption because the measure does not mandate restitution, it merely makes restitution, as commonly understood and as defined by Oregon statute, one of several sentencing options. The definition of restitution used by the Attorney General, in addition to the common understanding of the word, includes such things as (1) reimbursing an inmate's living costs, health care and other expenses, (2) financial support for the inmate's immediate family and (3) payments of fines, court costs and applicable taxes incurred by the inmate (Attorney General's ANSWERING MEMORANDUM TO PETITION TO REVIEW BALLOT TITLE, pages 5-6). These categories of obligations are not restitution within the normal meaning or general understanding of the term.

The initiative measure (hereafter referred to as "the ballot measure") states:

> BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON
>
> 1. The constitution of the State of Oregon is hereby amended by repealing Article I, section 40, and adopting a new Section 40 in place thereof to read as follows:
>
> (1) The penalty for aggravated murder as defined by law shall be (a) life imprisonment without any possibility of release or parole and (b) restitution as described in subsection (2) of this Section. Life imprisonment without any possibility of release or parole shall be

the mandatory penalty for aggravated murder, and a person convicted of aggravated murder may not receive a lesser sentence.

(2) Any income received by any person who is convicted of aggravated murder while that person is in prison shall be distributed in accordance with Section 41 of this Article.

(3) On the effective date of this measure, the sentence for any person who has been sentenced to death under Oregon law prior to the effective date of this measure and who has not been executed shall be changed to (a) life imprisonment without any possibility of release or parole and (b) restitution as described in subsection (2) of this section. Nothing in this measure shall be construed to affect any rights or defense that such person may have under existing law.

Section 41, of the Oregon Constitution, which the ballot measure states income "shall be distributed in accordance with", provides in relevant part for the distribution of income earned within prison:

"Except as otherwise required by federal law to permit transportation in interstate commerce of goods, wares or merchandise manufactured, produced or mined, wholly or in part by inmates or except as otherwise required by state law, any compensation earned through prison

> work programs shall only be used for the following purposes: **(a) reimbursement for all or a portion of the costs of the inmate's rehabilitation, housing, health care, and living costs; (b) restitution or compensation to the victims of the particular inmate's crime; (c) restitution or compensation to the victims of crime generally through a fund designed for that purpose; (d) financial support for immediate family of the inmate outside the corrections institution; and (e) payment of fines, court costs and applicable taxes.**" (Emphasis supplied.) Oregon Constitution, Art. I, § 41(8).

The Attorney General argued that these five categories all constituted "restitution".

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## REASONS FOR GRANTING THE WRIT

### I.

### THE INITIATIVE PROCESS IS AN IMPORTANT TOOL OF GOVERNMENT IN SEVERAL STATES, INCLUDING OREGON. THE RIGHT OF FREE SPEECH, THE RIGHT TO ASSEMBLE, EQUAL PROTECTION AND DUE PROCESS ALL REQUIRE THAT INFORMATION GIVEN TO THE PUBLIC BY THE STATE BE ACCURATE, AND NOT MISLEADING. THIS COURT HAS NEVER ADDRESSED THE BREADTH OF THAT PROTECTION.

The First Amendment and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution require that the information given to voters by the state be accurate. Statements that are inaccurate or misleading violate the fundamental

right of the electorate to be informed and undermine the integrity of the electoral process. The United States Constitution does not require that states provide a mechanism for referrals and initiatives, but once such a right is in place, due process and equal protection require that the process be fair. " . . . [O]nce citizens are granted the right to vote on a matter, the exercise of that vote becomes protected by the Constitution even though the state was not obligated to allow any vote at all." *Hussey v. City of Portland*, 64 F.3d 1260, 1263 (9th Cir 1995).

The ballot measure does not mandate restitution. ORS 137.103(3) currently defines restitution to mean " . . . full, partial or nominal payment of pecuniary damages to a victim." Victim is defined to mean " . . . any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities; 'victim' shall not include any coparticipant in the defendant's criminal activities." ORS 137.103(4). These definitions were the law when Article I § 41(8) of the Oregon Constitution was drafted and when it ultimately became law. There is nothing in the history of Article I § 41 to indicate that anyone intended the definition of restitution to be anything other than that found in ORS 137.103(3). There are also numerous references in Oregon law that say or imply that restitution is an obligation to the victim. (*See, e.g.*, ORS 137.706 and ORS 419.C450). Moreover, the Oregon Constitution, Art. I § 43(1)(d), expressly prohibits the criminal defendant from ever being considered the victim.

The Oregon Attorney General conceded that, under the proposed ballot measure, money earned by inmates convicted of aggravated murder could be distributed to

at least five different categories of recipients under the Oregon Constitution. Only two of the five categories, subsections (b) and (c), could arguably be called restitution. The ballot measure does not require that money mandated for restitution be distributed only to subsection (b) and (c) recipients. As a result, money allocated for restitution could be diverted to the three remaining categories referred to in Art. I § 41(8) that do not provide restitution as commonly understood or as defined by Oregon statute. These three other funds provide for: (1) reimbursement of an inmate's living costs, health care and other expenses, (2) financial support for the inmate's immediate family, and (3) payment of fines, court costs and applicable taxes. These are not restitution. They do not fulfill any monetary obligations owed to the victim or the victim's family. A reasonable person of ordinary intelligence would never characterize these payments as restitution and the ballot title at issue, authored by the Oregon Attorney General and approved by the Oregon Supreme Court, is unconstitutionally misleading.

Further, placing the phrase "mandates restitution" at the beginning of the ballot title aggravates the problem created by the ballot title certified by the Oregon Attorney General; the ballot title misleads by over-emphasizing the relative importance of "restitution" to the measure. Even if the five categories of recipients were considered to be restitution, restitution is such a minor part of the initiative that its placement at the beginning of the ballot title is inappropriate. The primary effect of this measure is to abolish the death penalty and set aside all current death sentences in Oregon. The first reference to setting aside all the death sentences in Oregon is found

mid-way through the ballot title "summary" of the measure. The summary does not even appear on the ballot. Only the ballot title and results of a "yes" or "no" vote appear on the ballot. As a result, the information available to voters at the time of voting is inaccurate, incomplete and misleading.

While Petitioner is unable to find a case directly on point, the federal courts have articulated the importance of citizens casting their votes based on accurate and complete information. "The foundation of our 'democratic process' is the right of all qualified voters to cast their votes *effectively*." *Ayers-Schaffner v. Disteano*, 37 F.3d 726, 729 (1st Cir. 1994) (emphasis added). "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure'." *Burdick v. Takushi*, 504 U.S. 428, 433, 119 L.Ed. 2d 245, 112 S.Ct. 2059 (1992). Elections must be "fair and honest." *Burdick*, 504 U.S. at 433.

This Court has also addressed the more closely related issue of ballot content. In *Anderson v. Martin*, 375 U.S. 399 11 L.Ed. 2d 430, 84 S.Ct. 454 (1964), this Court held that a Louisiana law that required the race of candidates to appear on the face of the ballot was unconstitutional. The Court reasoned that the danger of such legislation was "placing the power of the state behind a racial classification that induces racial prejudice at the polls." *Anderson v. Martin*, 375 U.S. at 402, 11 L.Ed. 2d at 433. While *Anderson* may be distinguishable from the case at hand because it did not involve the placement or endorsement of inaccurate information on the ballot, it acknowledges the unconstitutional practice of including

material that may impermissibly influence or sway voters.

In *Cook v. Gralike*, 531 U.S. 510, 149 L.Ed. 2d 44, 121 S.Ct. (2001), this Court relied on *Anderson* in reaching a similar conclusion about the proper function of the ballot. In *Cook*, this Court held that Article VIII of the Missouri Constitution (which mandated the printing of candidates' positions on term limits on the ballot) was unconstitutional because it exceeded Missouri's delegated power under the Elections Clause of the U.S. Constitution. In this respect, the case is distinguishable from the case before the Court. However, in reaching its opinion in *Cook*, this Court stated that while it is acceptable for a state to regulate the "procedural mechanisms of an election", a restriction on voting becomes problematic when, like Article VIII of the Missouri Constitution, it attempts to "dictate electoral outcomes". *Cook*, 531 U.S. at ___, 149 L.Ed. 2d at 56. By stating that the purpose of the measure is to "mandate restitution", the measure has the same pernicious effect of attempting to dictate the electoral outcome of the election by providing misleading information regarding "restitution" and by diverting the voter's attention from the measure's true purpose: repealing the death penalty.

## II.

## THE CERTIFICATION OF THE BALLOT MEASURE WILL VIOLATE MR. DOELL'S CONSTITUTIONAL RIGHTS THROUGHOUT THE ELECTORAL PROCESS.

While this Court has not ruled on the breadth of the Constitutional protections provided to someone in Mr.

Doell's position, the ballot measure's impact on the constitutionally protected sphere of the electoral process is significant enough to substantially interfere with Mr. Doell's rights at various stages of the electoral process.

In Oregon, the ballot title certified by the Oregon Attorney General's office and approved by the Oregon Supreme Court appears on each petition signature sheet circulated to obtain the requisite number of signatures to qualify the measure for the ballot. ORS 250.045(3). The ballot title approved by the court is relied upon in the signature gathering process. Placement of the ballot title in its current form on the signature sheets is inaccurate and misleading for the reasons outlined above. As a result, the title would interfere with Mr. Doell's rights by compromising his ability to campaign against the measure. Mr. Doell would be forced to adjust his message to accommodate for the inaccurate and misleading ballot title.

The proposed ballot title would also undermine Mr. Doell's rights during the campaign. If Mr. Doell were to say that the measure does not mandate restitution, the opponents could point out that the Oregon Supreme Court affirmed the ballot title. This would have an adverse effect on Mr. Doell's rights during the campaign because he would be forced again to adjust his message to comply with expectations created by the misleading ballot title. This problem is compounded by the fact that the inaccurate information will be in the official voter's pamphlet that voters often read.

Finally, Mr. Doell's rights will be violated during the election itself. The misleading caption will be on the

ballot while the "summary" portion of the ballot title that details the measure's full effect will not. As a result, registered voters like Mr. Doell will be casting their votes based on inaccurate information and in many cases could be voting for a position they do not support. The effect of placing the inaccurate caption on the ballot would be to interfere with Mr. Doell's rights "at the most crucial stage in the electoral process – the instant before the vote is cast[.]" *Anderson v. Martin*, 375 U.S. at 402, 11 L.Ed. 2d at 432.

## CONCLUSION

The Oregon Attorney General's Ballot Title, as approved by the Oregon Supreme Court, violates the rights of Petitioner Doell under the First and Fourteenth Amendments of the United States Constitution. For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Oregon.

DATED: August 30, 2001.

Respectfully submitted,

I. FRANKLIN HUNSAKER, III
BULLIVANT HOUSER BAILEY, PC
*Attorneys for Petitioners*

## LIST OF APPENDICES

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June 1, 2001 Judgment and Opinion of The Supreme Court of the State of Oregon ..... A-1

APPENDIX B

February 22, 2001 Letter from Mr. Doell to the Secretary of State ..... B-1

IN THE SUPREME COURT OF THE STATE OF OREGON

STEVEN DOELL,

Petitioner,

v.

HARDY MYERS, Attorney General, State of Oregon,

Respondent.

(SC S48325)

(Filed: June 1, 2001)

En Banc
On petition to review ballot title.
Argued and submitted May 9, 2001

John A. Bennett, of Bullivant Houser Bailey, PC, Portland, argued the cause and filed the petition for petitioner.

Kaye Ellen McDonald, Assistant Attorney General, Salem, argued the cause for respondent. With her on the answering memorandum were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

PER CURIAM

Ballot title certified. This decision shall become effective in accordance with ORAP 11.30(10).

PER CURIAM

This ballot title review proceeding, brought under ORS 250.085(2), concerns the Attorney General's certified ballot title for a proposed initiative measure, denominated by the Secretary of State as Initiative Petition 20

(2002). Petitioner is an elector who timely submitted written comments to the Secretary of State concerning the content of the Attorney General's draft ballot title and who therefore is entitled to seek review in this court. *See* ORS 250.085(2) (stating that requirement). We review the Attorney General's certified ballot title to determine whether it substantially complies with the requirements of ORS 250.035(2)(a) to (d). ORS 250.085(5).

Petitioner challenges the Attorney General's caption, result statements, and summary. Having considered each properly preserved argument advanced by petitioner in support of those challenges,[1] we determine that none is well taken. Accordingly, we certify the following ballot title to the Secretary of State:

AMENDS CONSTITUTION: MANDATES RESTITUTION AND LIFE IMPRISONMENT WITHOUT RELEASE/PAROLE AS AGGRAVATED MURDER SENTENCE; ELIMINATES DEATH PENALTY

RESULT OF "YES" VOTE: "Yes" vote mandates restitution and life imprisonment without release/parole for aggravated murder; eliminates death penalty, life with possibility of release/parole as sentencing options.

RESULT OF "NO" VOTE: "No" vote retains death penalty, life imprisonment with possibility of release/parole, and life imprisonment without possibility of release/parole, as aggravated murder sentencing options.

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[1] *See* ORS 250.085(6) (court enjoined from considering arguments concerning ballot title not presented in writing to Secretary of State unless exception (inapplicable here) applies).

SUMMARY: Amends Constitution. Under current law, juries determine whether persons convicted of aggravated murder are punished by death, life imprisonment without possibility of release or parole, or life improsonment with possible release or parole after thirty years. The proposed measure requires sentencing such persons to restitution and life imprisonment without possibility of release or parole. Additionally, sentences of persons previously sentenced to death, but not yet executed, must be changed to restitution and life without possible release or parole. Restitution means that any income received in prison by persons convicted of aggravated murder must be distributed only for certain purposes, including restitution to victims of the person's crime or a crime victims fund, and reimbursement for the prisoner's housing health rehabilitation, and living costs. Other provisions.

Ballot title certified. This decision shall become effective in accordance with ORAP 11.30(10).

[LOGO]

**CRIME VICTIMS UNITED**
**227 Cervantes • Lake Oswego, OR 97035 •**
**(503) 635-2245 • (503) 246-5368 Fax**

February 22, 2001

*By Fax & US Mail*

Ms. Colette Burghart
**State Capitol, Elections Division**
Room 141
Salem, Oregon 97410 *Fax (503) 373-7414*

Dear Ms. Burghart:

The draft ballot title from the Attorney General for initiative petition #20 is legally insufficient. It states that restitution will be mandated in all cases covered by the measure. In fact, convicted murderers who successfully assert indigence cannot be constitutionally required to pay restitution.

Additionally, the draft ballot title incorrectly states that all aggravated murderers convicted after the effective date of the measure will receive a life without parole sentence. In fact, such a sentence cannot be constitutionally required for a person who is pending trial at the time of the effective date of the measure.

Furthermore, proposed initiative petition #20 does not comply with procedural constitutional requirements for proposed initiative petition in that it changes more than one part of the current constitution. Specifically, Article I,

Sections 15, 16 and 40 are all effected [sic].

Sincerely,

/s/ Steve Doell
Steve Doell

*"To Promote a Balanced Criminal Justice System through Public Awareness and Legislative Action"*

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